**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

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| In re application of: | Bartley, et al. | Docket No.: | ROC920000298US1 |
| Serial No.: | 09/892,424 | Group Art Unit: | 2141 |
| Filed: | 06/27/01 | Examiner: | Luu, Le Hien |

For: APPARATUS, METHOD, AND BUSINESS METHOD FOR ENABLING CUSTOMER ACCESS TO COMPUTER SYSTEM PERFORMANCE DATA IN EXCHANGE FOR SHARING THE PERFORMANCE DATA

## REPLY BRIEF

Mail Stop APPEAL BRIEF - PATENTS
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir/Madam:

This reply brief is in response to the Examiner's Answer mailed 03/13/2006.

## ARGUMENT

**Issue 1:** **Whether claims 1-9 and 12-22 are unpatentable as being anticipated under 35 U.S.C. §102(e) by United States Patent Pub. No. 2002/0052947. "Method And System For Managing Performance Data Transfers For A Data Access Mechanism" to Duimovich.**

Claims 1 and 5

In the Examiner's Answer, the Examiner for the first time fully sets forth how the claims allegedly read on the cited art. After a review of Duimovich, the Examiner summarizes the new rejection as follows:

> "one function of the Agent 185's is allowing access to the performance data by the user of the User Site 50 only if the User Site 50 enables performance data transmission mechanism by allowing the Client Application 70 to be installed and configured on the User Site for collecting and transmitting the performance data to Director Server 120." (Examiner's answer, page 7)

The above cited portion of the Examiner's Answer now finds the claim limitation of enabling the performance data transmission mechanism to read on installing and configuring the software described in Duimovich. Appellant notes that this is the first time the Examiner has used the argument of installing the software as part of the rejection. Appellant believes the Examiner's above interpretation of Duimovich is a complete contortion of the ordinary meaning of these terms as understood by those of ordinary skill in the art, and that the Examiner's interpretation of Duimovich is not taught or suggested in Duimovich.

Enabling software is simply not the same as installing software. Those of ordinary skill in the art would not equate these two terms. So even if Duimovich taught or suggested the remaining elements of the claimed invention, one of ordinary skill in the art would not interpret Duimovich to teach enabling the transmission mechanism. Further, the plain meaning of installing is not the same as enabling. Enabling implies the software is already installed. To make this argument that installing equals enabling requires a leap of logic beyond the ordinary meaning of the terms and beyond the way the terms are used in the art. The Examiner has a hold of the proverbial square peg, and is trying to force it in a round hole, and has resorted to stretching terms beyond their customary and ordinary meaning.

The Examiner's interpretation of Duimovich is not taught or suggested in Duimovich. The Examiner's argument appears to be that Duimovich could be used to accomplish the same thing that is claimed by Appellant. Namely, the teaching of Duimovich being able to transmit performance data only when the software is installed is the same as the claimed invention. But, to establish a prima facie case, the cited art must teach or suggest the claimed invention, not just be able to accomplish the same task if used in the way taught by the Appellant. The Examiner appears to be using hindsight reconstruction. Duimovich does not teach or suggest to install the software when the user wants to gain access to the performance data by sharing the data. Duimovich does not teach or suggest the relationship of access to the data and transmission of the data as provided in the claims. Even if the user in Duimovich were to install the software, it would be to provide the data to the remote user as suggested by the cited portion of Duimovich (col.3, paragraph 39). There is no discussion in Duimovich concerning the relationship of access to the data by the user of the machine collecting the data and enabling transmission of the data transmission mechanism, or even installing the software for this purpose.

Duimovich describes a client application that collects web browser-based performance data. The performance data is shared in the form of a page summary by placing it in a shared memory segment. The performance data is not transmitted, but is placed in shared memory where it is may be read, and thus shared. There is no discussion in the cited text concerning the data access mechanism allowing access to performance data by a user of the computer system only if the performance data transmission mechanism is enabled. This claimed feature allows the supplier of software or hardware to control the access to performance data by a user only if the user is willing to share the performance data. The art cited by the Examiner does not teach or suggest this interaction of the performance data access mechanism and the performance data transmission mechanism.

The Examiner's new argument appears to be in response to Appellant pointing out that in Duimovich, any collected performance data by the user's computer system is *always* available to the user. Duimovich does not teach or suggest that the user site has conditional access to performance data that it collects depending on whether the performance data is transmitted. So the Examiner has found a new argument that the time when the performance data is not available to the user is when the software is not installed. However, this argument is faulty for all the reasons stated above. Therefore the cited art does not teach or suggest claims 1 and 5, and appellant respectfully requests that the Examiner's final rejection of claims 1 and 5 under 35 U.S.C. §102(e) be reversed.

Claims 2 and 6

Claims 2 and 6 depend on claims 1 and 5, respectively. The arguments above with respect to claims 1 and 5 apply equally to claims 2 and 6, and are incorporated in this section by reference. The Examiner's answer notes that new arguments for these claims and the claims below were raised by Appellant in the Appeal Brief. Appellant is unaware of any rules or statutes that forbid the appellant from making new attacks on

the Examiner's rejection in the Appeal Brief. It is the Examiner that has restrictions on raising new arguments on appeal, not the appellant.

Further, with regards to claims 2 and 6, the Examiner has not shown in the prior art where the relationships of the vendor and customer are related to the first and second computer systems recited in claims 2 and 6. The cited section of Duimovich (page 3, para. 36) discusses data stored in the warehouses 140 may be reviewed by subscribers to the performance management service. This cite does not clearly reveal the Examiner's mapping of the claim elements of vendor and customer as it relates to the first and second computer systems. The cited art deals with service providers that can subscribe to the performance management service. It appears from this section that it is the service provider that is sharing performance data with the subscribers. The performance data in the data warehouse 140 is shared with the user site 50 over the internet 40 via the reporting server 150. This reading of Duimovich does not have the claimed direction of performance data sharing, i.e. the "customer computer sharing the performance data." Therefore, claims 2 and 6 are independently patentable over the cited art, notwithstanding the patentability *vel non* of other claims herein. In addition, claims 2 and 6 depend on claims 1 and 5, respectively, which are allowable for the reasons given above. As a result, claims 2 and 6 are also allowable as depending on allowable independent claims. Appellant respectfully requests that the Examiner's final rejection of claims 2 and 6 under 35 U.S.C. §102(e) be reversed.

Claims 3-4 and 7

The arguments above with respect to claims 1 and 5 apply equally to claims 3-4 and 7, and are incorporated in this section by reference. Claims 3-4 and 7 depend on claims 1 and 5, respectively, which are allowable for the reasons given above. As a result, claims 3-4 and 7 are also allowable as depending on allowable independent claims. Further, with regards to claims 3-4 and 7, the Examiner has not shown any teaching in the

prior art that shows the performance data collected by the operating system where the user is given limited access to the performance data in the manner claimed. Appellant respectfully requests that the Examiner's final rejection of claims 3-4 and 7 under 35 U.S.C. §102(e) be reversed.

Claims 8 and 9

Independent claims 8 and 9 were rejected by the Examiner on the same rationale as claims 5-7. The arguments above with respect to claims 1 and 5 apply equally to claims 8 and 9, and are incorporated in this section by reference. In addition, in claims 8 and 9 the enabling of the performance access mechanism is in the form of steps that are performed in a specific sequence. Appellant respectfully asserts that Duimovich does not teach or suggest these steps as claimed. In the Examiner's Answer, the Examiner uses a new approach and different arguments than the arguments for the previous claims. The Examiner argues that if the client application is installed, then it is enabled for collecting performance data, and if it is installed but not configured, then the agent does not allow the user to access the performance data. This argument, though slightly different suffers from the same problems as described above for claim 1. Further, Duimovich does not teach or suggest to install the software but not configure it as suggested by the Examiner. As a result, the Examiner has failed to establish a prima facie case of anticipation for these claims under 35 U.S.C. §102(e). Appellant respectfully requests that the Examiner's final rejection of claims 8 and 9 under 35 U.S.C. §102(e) be reversed.

Claims 10 and 11

Independent claims 10 and 11 were allowed by the Examiner.

Claims 12 -22

In the Examiner's Answer, the examiner attempts to blame the lack of establishing a prima facie case for claim 12-22 on a typographical error. The examiner has the burden of establishing a prima facie case in the rejection, and the fact that the examiner failed to address claims 12-22 in the first office action and again in the second, final office action results in the examiner failing to establish a prima facie case of anticipation for claims 12-22 under 35 U.S.C. §102(e). The examiner's explanation of the typographical error in the Examiner's Answer does not make up for failing to establish a prima facie case of anticipation for claims 12-22 in the first two office actions. As a result, the examiner has still failed to establish a prima facie case of anticipation for claims 12-22 under 35 U.S.C. §102(e).

In the Examiner's Answer, claims 12-22 were rejected by the Examiner for the first time under the same rationale as claims 1-4 and 8-11. The rejection of these claims suffers from the same problems as discussed above, and the arguments above are incorporated here. Claims 12-22 are thus allowable for the many reasons discussed above. Appellant requests that the Examiner's final rejection of claims 12-22 under 35 U.S.C. §102(e) be reversed.

## CONCLUSION

Claims 1-9 and 12-22 are addressed in this Appeal. For the numerous reasons articulated above and in the Appeal Brief, Appellant maintains that the rejection of claims 1-9 and 12-22 under 35 U.S.C. § 102(e) is erroneous.

Appellant respectfully submits that this Reply Brief fully responds to the new arguments raised by the Examiner for the first time in the Examiner's Answer. Appellant respectfully requests that the final rejection be reversed and that all claims in the subject patent application be found allowable.

Respectfully submitted,

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## CLAIMS APPENDIX

1. A computer system comprising:

at least one processor;

a memory coupled to the at least one processor;

a performance data collection mechanism residing in the memory and executed by the at least one processor, the performance data collection mechanism collecting performance data for the computer system;

a performance data transmission mechanism residing in the memory and executed by the at least one processor, the performance data transmission mechanism, when enabled, transmitting at least a portion of the performance data to another computer system coupled to the computer system via a network; and

a performance data access mechanism residing in the memory and executed by the at least one processor, the performance data access mechanism allowing access to the performance data by a user of the computer system only if the performance data transmission mechanism is enabled.

2. The computer system of claim 1 wherein the computer system comprises a customer computer system and the another computer system comprises a vendor computer system.

3. The computer system of claim 1 wherein the performance data comprises data collected by an operating system residing in the memory and executed by the at least one processor.

4. The computer system of claim 1 wherein the performance data collection mechanism, the performance data transmission mechanism, and the performance data access mechanism are all controlled by an operating system residing in the memory and executed by the at least one processor.

5. A networked computer system comprising:

(A) a first computer system;

(B) a second computer system coupled to the first computer system via a network, the second computer system comprising:

(B1) a performance data collection mechanism that collects performance data for the second computer system;

(B2) a performance data transmission mechanism that, when enabled, transmits at least a portion of the performance data to the first computer system; and

(B3) a performance data access mechanism that allows access to the performance data by a user of the second computer system only if the performance data transmission mechanism is enabled.

6. The networked computer system of claim 5 wherein the first computer system comprises a vendor computer system and the second computer system comprises a customer computer system.

7. The networked computer system of claim 5 wherein the performance data comprises data collected by an operating system.

8. A method for a user of a second computer system coupled via a network to a first computer system to access performance data collected by the second computer system, the method comprising the steps of:

(A) the second computer system collecting the performance data;

(B) the second computer system determining whether transmission of the performance data from the second computer system to the first computer system is enabled;

(C) if transmission of the performance data from the second computer system to the first computer system is enabled, allowing the user to access the performance data; and

(D) if transmission of the performance data from the second computer system to the first computer system is not enabled, not allowing the user to access the performance data.

9. A method for a first computer system to collect performance data from a second computer system coupled via a network to the first computer system, the method comprising the steps of:

(A) the second computer system collecting the performance data;

(B) the second computer system determining whether transmission of the performance data from the second computer system to the first computer system is enabled;

(C) if transmission of the performance data from the second computer system to the first computer system is enabled, allowing access to the performance data by a user of the second computer system;

(D) if transmission of the performance data from the second computer system to the first computer system is not enabled, not allowing access to the performance data by a user of the second computer system; and

(E) the second computer system transmitting at least a portion of the performance data to the first computer system.

10. A method for a user of a second computer system coupled via a network to a first computer system to access performance data collected by the second computer system, the method comprising the steps of:

(A) the second computer system collecting the performance data;

(B) the second computer system allowing the user to access a limited portion of the performance data;

(C) if the user requests to access more than the limited portion of the performance data:

(C1) the second computer system determining whether transmission of the performance data from the second computer system to the first computer system is enabled;

(C2) if transmission of the performance data from the second computer system to the first computer system is enabled, allowing the user to access the requested performance data; and

(C3) if transmission of the performance data from the second computer system to the first computer system is not enabled, not allowing the user to access the requested performance data.

11. A method for a first computer system to collect performance data from a second computer system coupled via a network to the first computer system, the method comprising the steps of:

(A) the second computer system collecting the performance data;

(B) the second computer system allowing the user to access a limited portion of the performance data;

(C) if the user requests to access more than the limited portion of the performance data:

(C1) the second computer system determining whether transmission of the performance data from the second computer system to the first computer system is enabled;

(C2) if transmission of the performance data from the second computer system to the first computer system is enabled, allowing access to the requested performance data by a user of the second computer system;

(C3) if transmission of the performance data from the second computer system to the first computer system is not enabled, not allowing access to the requested performance data by a user of the second computer system; and

(C4) the second computer system transmitting at least a portion of the performance data to the first computer system.

12. A method for doing business comprising the steps of:

(A) offering to a customer the ability to access performance data gathered by a customer computer system in exchange for the customer's sharing of the performance data;

(B) if the customer does not accept the offer in (A), disabling customer access to the performance data on the customer computer system;

(C) if the customer accepts the offer in (A), enabling customer access to the performance data on the customer computer system.

13. The method of claim 12 further comprising the step of:

(D) the customer computer system sharing the performance data.

14. The method of claim 12 further comprising the step of:

selling the customer computer system to the customer.

15. A program product comprising:

(A) a performance data collection mechanism that collects performance data for a first computer system;

(B) a performance data transmission mechanism that, when enabled, transmits at least a portion of the performance data to a second computer system;

(C) a performance data access mechanism that allows access to the performance data only if the performance data transmission mechanism is enabled; and

(D) computer-readable signal bearing media bearing (A), (B) and ©).

16. The program product of claim 15 wherein the signal bearing media comprises recordable media.

17. The program product of claim 15 wherein the signal bearing media comprises transmission media.

18. The program product of claim 15 wherein the performance data comprises data collected by an operating system.

19. A program product comprising:

(A) an operating system comprising:

(A1) a performance data collection mechanism that collects performance data for a first computer system;

(A2) a performance data transmission mechanism that, when enabled, transmits at least a portion of the performance data to a second computer system;

(A3) a performance data access mechanism that allows access to the performance data only if the performance data transmission mechanism is enabled; and

(B) computer-readable signal bearing media bearing the operating system.

20. The program product of claim 19 wherein the signal bearing media comprises recordable media.

21. The program product of claim 19 wherein the signal bearing media comprises transmission media.

22. The program product of claim 19 wherein the performance data comprises data collected by an operating system.